IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 19TH OCTOBER 2007 / 27TH ASWINA 1929

SA.No. 590 of 1994()

AS.90/1988 of II ADDL.SUB COURT,TRIVANDRUM
OS.115/1986 of PRL.M.C.,NEYYATTINKARA

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APPELLANT: 2ND RESPONDENT/2ND PLAINTIFF

MOSA SYLAS, KUNNATHUKONATHU VEEDU,
IRUMBIL DESOM, NEYYATTINKARA, NOW RESIDING
AT SHEEJA BHAVAN, KUTTELIKONAM,
MARUTHATHOOR, CHAYKOTUKONAM P.O.
(VIA) AMARAVILA, NEYYATTINKARA.

BY ADV. SRI.S.JAMES VINCENT

RESPONDENTS:ADDL.APPELLANTS 2 TO 7 AND RESPONDENTS 3 & 4 - L.RS OF DECEASED DEFENDANT AND PLAINTIFFS 3 & 4

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1. C.VASUNDHATHI, THEKKEKOLLAMVILA VEEDU,
   IRUMBIL DESOM, NEYYATTINKARA.
2. C.SURESH KUMAR, OF DO DO.
3. V.SURAJAMBIKA, OF DO. DO.
4. C.SAJEEV, OF DO. DO.
5. V.SUJA, OF DO. DO.
6. V.SINDHU, OF DO. DO.
7. MOSA THAMPI, KUNNATHUKONATHU VEEDU,
   IRUMBIL DESOM, NEYYATTINKARA.
8. MOSA BENSIFER, OF DO. DO.

BY ADV. SRI.L.MOHANAN FOR R1, R4, R6

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 19/10/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.NO. 590 OF 1994

Dated, this the 19th day of October,2007

JUDGMENT

Plaintiffs in O.S.115/1986 before Munsiff Court Neyyattinkara are the appellants. Legal heirs of the original defendant who were impleaded while the first appeal was pending are the respondents. Appellants instituted the suit seeking a decree for permanent prohibitory injunction. The trial court on the evidence, finding that under Ext.B1 judgment and Ext.A1 decree in O.S.499/1966 accepting Ext.B3 decree in O.S.6/1951, the property belonging to the appellants was fixed in accordance with the plan appended to Ext.B3 decree and granted a permanent prohibitory injunction restraining respondents from tampering with the existing boundary on CDHKNO plot. Respondents challenged the decree and judgment before Sub Court, Thiruvananthapuram in A.S.90/1988. Learned Sub Judge on apppreciation of evidence accepted the findings of trial court

that the property of appellants is the one as demarcated in Ext.B3 decree and Ext.A1 decree.But learned Sub Judge found that Ext.B3 decree was suppressed in the plaint and eventhough under Ext.B3 the extent of the property is 56.791 cents appellants sought a decree in respect of 57 ½ cents and respondents have unambiguously stated in the written statement that they had no intention to trespass into the plot found by courts in Ext.A1 belonging to the appellants and cause of action to file the suit was not established and therefore trial court should not have granted the decree for injunction. The appeal was allowed and the decree granted by trial court was set aside. It is challenged in this appeal.

2. The appeal was admitted formulating the following substantial questions of law.

1. Whether non-mention in the plaint of an earlier decree, which merged in a subsequent decree on basis of which delivery was affected and boundary was put up, would disentitle plaintiffs from getting a decree for permanent prohibitory

injunction.

2. Whether failure of the plaintiffs to amend the plaint and seeking a lesser relief on the basis of the contentions of the defendants would disentitle plaintiffs from getting a lesser suitable relief .

3. Whether plaintiffs are bound to adduce evidence in respect of the allegations in the plaint, when the allegations are admitted in the written statement and no specific issue was raised.

3. Learned counsel appearing for appellants and respondents were heard.

4. The case had a checkered history. Plaint schedule property admittedly originally belonged to Irupadom Daniel. He created a mortgage in favour of Joseph Vedakannu, the father of the original defendant, in 1102 M.E. and father of respondents was in possession of the property as a mortgagee. On the death of Gurupadam Daniel his right of equity of redemption devolved on his children who instituted O.S.6/1951 before Munsiff Court, Neyyattinkara for redemption of mortgage. They

deposited the mortgage money. While so, they executed an assignment of their right of equity of redemption in respect of item No.1 of the mortgage property, which is the plaint schedule property herein, in favour of Rayappan Mosa, who later instituted O.S.499/1966 before Munsiff Court, Neyyattinkara. On the strength of the assignment deed he got himself impleaded as third plaintiff as seen from Ext.B3 decree. As per Ext.B3 decree, plot DHKNOC and T S W S were directed to be redeemed on deposit of the mortgage amount and the value of improvements. It is thereafter assignee Rayappan Mosa instituted O.S.499/1966 seeking a decree for redemption and putting boundary contending that on his behalf also the mortgagee has already been redeemed by the other plaintiffs and as per Ext.B3 decree he is entitled to get item No.1 therein allotted to him. As per Ext.A1 decree and B1 judgment, Rayyappan Mosa was allowed to redeem item No.1 of the property in Ext.B3 decree which is the plaint schedule property herein, on deposit of Rs.274.82. It was also

provided that he is entitled to put up boundaries over plot No.1 which is shown in the plan appended to Ext.B3 decree subject to the directions contained in Ext.B4 order. Ext.B4 order was passed by the Munsiff in O.S.6/1951 at the time of execution of the decree whereunder the Commissioner has fixed the boundary as provided in Ext.B3 decree, so as to exclude the three buildings standing in the southern portion of property. Ext.B4 order was challenged before this court by defendants in the suit, in C.R.P.3308/1980. Under Ext.A5 order C.R.P. was dismissed confirming Ext.B4 order. Pursuant to Ext.A1 decree Rayappan Mosa took delivery of the property. Ext.A2 is the report of the Commissioner establishing the delivery. It is thereafter the present suit was filed by appellants contending that though the boundary was fixed pursuant to Ext.A1 decree, respondent was attempting to demolish the southern compound wall with an intention to trespass into the property and he has no right to do so and therefore he is to be restrained by a permenent

prohibitory injunction. Defendant filed a written statement contending that though a boundary wall was put up pursuant to Ext.A1, decree subsequently it was destroyed in a flood and defendant did not attempt to trespass into the property and he had no intention to trespass into the property and absence of a boundary wall affects privacy of defendant and so he had constructed a basement within his property with an intention to construct a compound wall and the suit was filed to prevent construction of the compound wall over it and appellants are not entitled to the decree sought for. It is on the basis of the contention of the defendant in the written statement that defendant had no intention to trespass into the property of appellants and defendant admitted the right and title of appellants to item No.1 of Ext.B3 decree schedule property which was taken delivery by plaintiffs pursuant to Ext.A1 decree, first appellate court held that appellants are not entitled to the decree for injunction granted by the trial court. First appellate court also found

that eventhough Ext.B3 and the plan appended to the decree establish that the property belong to appellants is only 56.791 cents, they have claimed 57 ½ cents of the property and that no evidence was adduced to prove that there was an attempt to trespass into the property. First appellate court therefore found that appellants are not entitled to the decree sought for.

5. The argument of learned counsel appearing for appellants is that when the very contention raised in the written statement was that the original boundary wall constructed through the court was destroyed by flood and a basement was constructed by defendant with an intention to construct a compound wall over the same and it was alleged by appellants that the attempt of the defendant is to trespass into plaint schedule property, first appellate court should not have interfered with the decree as the defendant did not adduce any evidence to prove that the original wall constructed through court was destroyed and as he did not seek permission of the court to put up a

new compound wall as contended in the written statement, appellants are entitled to get a decree for permanent prohibitory injunction.

6. Learned counsel appearing for respondents argued that defendant did not dispute the right and title of appellants over item No.1 of plaint B schedule property as demarcated in plan No.4 appended to Ext.B3, subject to the modification made under Ext.A1 decree and respondents are not disputing that plot CDHKNO is the property belonging to appellants and CONK is the southern boundary of the said plot which separate the property of respondent which lies to the south and in such circumstance, first appellate court rightly held that appellants are not entitled to the decree sought for.

7. On hearing the counsel on both sides, it is clear that there is no dispute with regard to the right, title and possession of appellants to plot CDHKNO as demarcated in the plan appended to Ext.B3 decree or CONK as the southern boundary of the said plot, which separates the property of

respondents. It is also admitted case that a boundary wall was put up, as evidenced by Ext.A2 report of the Commissioner, pursuant to Ext.A3 decree. Therefore the fact that plot C DH K N O is the property of appellants and CONK is the demarcating boundary of the said property cannot be disputed. Ext.A1 decree shows that the plan appended to Ext.B3 was accepted and the decree was granted with the modification made in Ext.B4 order. In fact on these aspects, there was no dispute at the Bar. The question is, in such circumstance whether a decree for injunction is to be gratned.

8. What was contended by defendant in his written statement was that the original wall constructed through court was got destroyed by flood. As pointed out by learned counsel appearing for appellants, no evidence was adduced to that aspect. So also it was contended in the written statement that defendant had put up a foundation in his property with the intention of putting up a compound wall. It is also to be born in mind that, what was contended in the written statement was not

that he put up the foundation at the place where the original wall was existing, but within his property. In such circumstance, interest of justice will be served by declaring that plot CDHKNO as shown in the plan appended to Ext.B3 decree is the plaint schedule property belonging to appellants and CONK is the boundary separating the said property from the property of respondents. Appellants are entitled to put up a boundary on CON K line if necessary through court.

Appeal is disposed of accordingly.

M.SASIDHARAN NAMBIAR
JUDGE

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